No. 15210

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RENNIE & LAUGHLIN, INC., a Corporation,

Appellant,

vs.

CHRYSLER CORPORATION,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This is an appeal by plaintiff from an order dismissing its amended complaint and its action against defendant on the ground that the complaint failed to state a claim upon which relief could be granted. The order was made by the United States District Court for the Southern District of California, Central Division (Judge Tolin) in an action for breach of contract.

Jurisdiction.

The appealed order was made on May 11, 1956 and was entered May 15, 1956 [R. 71]; Notice of Appeal was given on June 12, 1956 [R. 72].

Original jurisdiction was conferred on the District Court by 28 U. S. C. 1332 by reason of the facts that the amended complaint alleged that the parties were citizens of different states [R. 61], and the amount in controversy exceeded $3000.00 [R. 66]. Jurisdiction to review the judgment is conferred on this Court by 28 U. S. C. 1291.

Statement of Case.

On August 8, 1955, appellant filed a complaint for breach of contract against Chrysler Corporation [R. 3 *et seq.*]. Chrysler subsequently noticed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted, or for a more definite statement [R. 55]. By stipulation, the motion was withdrawn [R. 59] and appellant filed an amended complaint [R. 61] attaching thereto the exhibits set forth in the Transcript of Record at pages 9 *et seq.* and 33 *et seq.*

Chrysler again moved to dismiss the complaint for failure to state a claim upon which relief can be granted [R. 69]. It is from the order dismissing the amended complaint that this appeal is taken.

The Amended Complaint.

In its amended complaint, appellant alleged that on December 12, 1949, it entered into a contract with defendant Chrysler Corporation whereby it became a dealer in DeSoto and Plymouth motor vehicles [Par. III, IV and V, R. 61-62]. In the month of July, 1951, appellants' president and active manager suffered a heart attack which prevented him from working [Par. VII, R. 62]. Due to this fact and the fact that the business had been losing money, in September of 1951, appellant advised Chrysler of its desire to sell the business, and Chrysler, through its agents, volunteered to find a purchaser acceptable to both parties [Par. VIII, R. 63]. Chrysler thereafter referred certain prospective buyers to appellant and negotiations were commenced on October 1, 1951 [Par. IX, R. 63]. On October 26, 1951, all terms of the transfer to the persons recommended by Chrysler were complete and it was agreed that a formal contract

would be executed and the price paid on the next day [Par. X, R. 63]. Prior to the execution of the contract, however, Chrysler informed the buyers that it had revoked its consent to the transfer and they, therefore, refused to complete the sale. Chrysler later advised appellant that it had withdrawn its consent in order to reduce the number of dealers in the area [Par. XI and XII, R. 64].

Thereafter, appellant was forced to turn over the operation of its business to the prospective purchasers who operated it until March 31, 1954, when appellant was forced to discontinue business because of losses amounting to $102,686.64. In addition to this loss, appellant lost the agreed price of the business, $77,921.69, and its reputation as an automobile dealer was irreparably damaged [Par. XIV to XIX, R. 64-66].

Specification of Error.

The District Court erred in dismissing the amended complaint and the action for failure to state a claim upon which relief can be granted.

Summary of Argument.

Point I.

The Complaint States a Claim Upon Which Relief Can Be Granted.

(a) Consent to the proposed assignment was given.

(b) Consent to the proposed assignment was wrongfully revoked.

Point II.

The Complaint States a Claim Sufficient Against a Motion to Dismiss.

ARGUMENT.

POINT I.

The Complaint States a Claim Upon Which Relief Can Be Granted.

(a) Consent to the proposed assignment was given.

Since this is an appeal arising from the granting of a motion to dismiss, all facts well pleaded in the amended complaint must be taken as true. (*Karseal Corporation v. Richfield Oil Corporation,* 9 Cir., 1955, 221 F. 2d 358.

The contract [Ex. A] between appellant and Chrysler contemplated the possibility that a dealer might want to assign his rights under it. Paragraph 7 thereof states in part:

> "Accordingly it is agreed that this agreement shall terminate immediately by its own force without notice from either party in the event of (1) an attempted assignment of this agreement by Direct Dealer without DeSoto's written consent; . . ." [R. 19].

When appellant, for health and financial reasons, found it necessary to sell its business, it so advised Chrysler, and Chrysler thereafter actively procured the prospective purchasers for the business. The requirement of written consent to the assignment was obviously for the protection of Chrysler; its action in recommending the assignees waived this requirement. As the Court said in *Gilmore v. Hoffman,* 123 Cal. App. 2d 313, 266 P. 2d 833, 837:

> "Their actual knowledge was equivalent to notice, particularly where, as here, they acted upon the oral notice and thoroughly understood the situation, were not relying on any such written notice, and apparently waived it. A provision in a contract pertaining to written notice may be waived, either expressly or by conduct, by the party for whose benefit it is inserted. *Daly vs. Ruddell,* 137 Cal. 671, 70 Pac. 784."

See also:

Continental Casualty Co. v. Schaefer, 9 Cir., 1949, 173 F. 2d 5;

Power Service Corp. v. Joslin, 9 Cir., 1949, 175 F. 2d 698.

(b) Consent to the proposed assignment was wrongfully revoked.

Chrysler, of course, was under no duty to consent to appellant's proposed assignment, but having consented and having procured acceptable assignees, it could not then revoke its consent, at least for reasons not related to the contract. Having consented, Chrysler impliedly promised that it would do nothing to prevent appellant's making the assignment, because from the nature of the promise and the circumstances under which it was made it is apparent that the parties must have proceeded on the basis that the consent would not be revoked and, therefore, that condition is implied in the contract.

Baldwin Rubber Co. v. Paine & Williams Co., 6 Cir., 1939, 107 F. 2d 350;

Sacramento Navigation Co. v. Salz, 273 U. S. 326.

Chrysler did not revoke its consent to the assignment for reasons related to the contract; J. B. Wagstaff, the General Sales Manager for DeSoto Division who executed the contract, admitted that the sale had been approved, but that later it was decided to revoke the consent in the hope that the number of dealers in the area would be reduced [R. 64]. Chrysler thereby used its knowledge of appellant's physical and financial condition to further its own purposes to appellant's detriment.

POINT II.

The Complaint States a Claim Sufficient Against a Motion to Dismiss.

The complaint sets forth a contract between the parties; that one of the provisions of the contract required the written consent of Chrysler to an assignment; that consent was obtained, the requirement of a writing having been waived by Chrysler; that the consent was wrongfully revoked, and that appellant was damaged thereby. Appellant could have pleaded many more facts, but not without doing violence to the Federal Rules of Civil Procedure.

> "Rule 8 restricts pleading to a short and plain statement of (1) the grounds for the court's jurisdiction, (2) a similar statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief for which he deems himself entitled."
>
> *Sidebotham v. Robison,* 9 Cir., 1954, 216 F. 2d 816, 826.

In *Gruen Watch Co. v. Artists Alliance,* 191 F. 2d 700, at page 705, this Court said in reversing a judgment entered on an order dismissing a complaint on the ground that it failed to state a claim on which relief could be granted:

> "On occasion motions to dismiss supply a useful technique for the prompt disposition of suits, and the Federal Rules of Civil Procedure which permit judgment on the pleadings are useful indeed. But it must be borne in mind that in many a suit such a motion cannot take the place of submission of evidence and of findings of fact and conclusions of law. Every motion to dismiss must be viewed in the light of Rule 8 (a), (e) and (f), Fed. Rules Civ. Proc.

28 U. S. C. A. Such a motion should not be granted unless it appears clearly that no cause of action is stated. The court below was not concerned with the question as to whether Gruen had a claim on which it is ultimately entitled to prevail but whether the second amended and supplemental complaint, construed in the light most favorable to Gruen, and with all doubts resolved in favor of the complaint's sufficiency, *stated* a claim on which relief could be granted."

Conclusion.

For the foregoing reasons, it is respectfully submitted that the complaint does state a claim on which relief can be granted, and that, therefore, the judgment dismissing it should be reversed.

Respectfully submitted,

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